IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 20, 2009 Session

JANICE SCHAAP JOHNSON v. MARK LANIER JOHNSON

Appeal from the Circuit Court for Williamson County
No. I-98012 Robert E. Lee Davies, Judge

No. M2008-00236-COA-R3-CV - Filed April 2, 2009

Husband filed Petition to Modify Child Support because, among other things, one of the minor children turned eighteen. Following a hearing on the matter, the trial court found that a significant variance in the circumstances existed to require the modification of each party's child support obligation. On appeal, Wife raises issues with the trial court's (1) imputation and calculation of both party's annual income; (2) allocation of the children's private school tuition; (3) failure to hold a hearing on Wife's Motion to Rehear; (4) suspension of discovery and failure to address a pending Motion to Compel; and (5) failure to award legal expenses. Finding that the trial court did not err, we affirm its decision in all respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ. joined.

Janice S. Johnson, Nashville, Tennessee, Pro Se.

Roger Reid Street, Jr. and M. Matthew Milligan, Franklin, Tennessee, for the appellee, Mark L. Johnson.

OPINION

I. Procedural History

On January 24, 2006, Mark Johnson ("Husband") filed a Petition to Modify Child Support, alleging that there had been a 15% change in his gross income, that there was a change in the number of children for whom he was legally responsible to provide support and that there would be a 15% change in the amount of the support to be paid. On February 28, 2006, Janice Johnson ("Wife") filed an answer and counterclaim, which sought (1) a civil contempt against Husband for failure to produce his tax returns as required by a previous court order, (2) a modification of Husband's

obligation for educational expenses which had increased, and (3) a modification of parenting time to remove Husband's midweek period of parenting time.

After a number of continuances[1], the trial was held on November 13 and 21, 2007. In an order dated December 20, 2007, the court found the following: (1) that significant variance had occurred in that one child had attained the age of 18 and graduated from high school; (2) that Husband's annual income was $260,000 and Wife was capable of earning $30,000; (3) that child support for the two remaining minor children should be reduced to $2,145.00 per month, retroactive to April 1, 2006, causing an overpayment of $36,220; (4) that Husband should be responsible for the private school tuition of the older child for the 2006-2007 school year in the amount of $15,000, less any amounts previously paid, for the 2007-2008 school year in the amount of $15,000, less any scholarships or gifts, and for the 2008-2009 in the amount of $15,000[2]; (5) that the youngest child should remain at the public school where he was currently enrolled; (6) that Wife's request for modification of parenting time should be denied; (7) that Wife should be awarded the tax deduction for the minor children; (8) that uncovered medical expenses should be paid 90% by Husband and 10% by Wife; and (9) that Husband's request for attorney's fees should be denied. Wife appeals.

II. Factual Background

Husband and Wife were divorced by Final Decree of Divorce on August 14, 1998, after 18 years of marriage. At the time of divorce, there were 4 minor children who resided with Wife pursuant to the Marriage Dissolution Agreement ("MDA"), which listed Husband and Wife as joint custodians of the children. Subsequently, Husband filed a Petition to Change Custody as to one of the minor children; on November 8, 2001, the court entered an order granting custody of the oldest daughter to Husband and requiring Husband (1) to pay $3925.00 per month in child support[3] to Wife for the three children remaining in her custody in accordance with the flat percentage guidelines, (2) to pay $313 per month for private school tuition for the minor children, and (3) to provide a copy of his tax returns to Wife within 10 days of filing the same with the IRS. The order also designated Wife as the primary residential parent ("PRP") and Husband as the alternate residential parent ("ARP") as to the three children remaining in Wife's custody, and vice versa as to the oldest daughter in Husband's custody.

Husband worked as a urologist at Associated Urologists, a partnership in which he was a partner, until March 2006. In April 2006, he left the partnership and opened a pain management practice called Prolotherapy. Husband started the business as a sole practitioner and it continues to

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[1] These continuances will be discussed in detail in Section V, Subsection D, *infra*.

[2] The trial court also found that Husband's modified private school tuition obligation should relate back to the previous school year and that Wife should have a judgment for those expenses. The order stated that the net overpayment, based on the additional $36,220 paid by Husband for child support and Wife's judgment for the prior year's educational expenses, was $25,628 by Husband.

[3] This child support figure was based on Husband's annual income of $170,000.

be his main source of income. Husband testified that his income for 2005 was $145,000, for 2006 was $245,000, and for the first 10 months of 2007 was $206,000.

In 2004, Wife incorporated two businesses, New Horizon Health and Sterling Consultants, and served as president of both. She did not receive a salary from the corporations, but was paid non-employee compensation for doing contract labor. Wife testified that her income for 2004 was $22,584, for 2005 was $27,324, and for 2006 was approximately $15,000-$20,000.

III. Statement of the Issues

Wife raises a number of issues for review on appeal, but does not address all of those issues in the argument section of her brief. "This Court is under no duty to...consider issues raised but not argued in the brief." *Bean v. Bean*, 40 S.W.3d 52, 56 (Tenn. Ct. App. 2000). Thus, we will only resolve the following issues that Wife has addressed in her brief:

1. Whether the trial court erred in its calculation of Husband's income.

2. Whether the trial court erred in its imputation of $30,000 in annual income to Wife.

3. Whether the trial court erred in not applying the Hardship Provision of the Income Shares Model and in not allowing an upward deviation from the child support guidelines.

4. Whether the trial court erred in not requiring Husband to pay the full private school tuition for the older child and in not ordering Husband to pay the private school tuition for the youngest child when Husband agreed to do so in the MDA.

5. Whether the trial court erred in denying Wife's Motion to Rehear without a hearing.

6. Whether the trial court erred in not allowing Wife to complete discovery and in not addressing her pending Motion to Compel.

7. Whether the State of Tennessee should be required to cover Wife's legal expenses for its alleged failure to provide sufficient services to defend this action**.**

IV. Standard of Review

Our scope of review of the findings of fact of a trial court sitting without a jury is *de novo*, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. *See Walker v. Saturn Corp.*, 986 S.W.2d 204, 207 (Tenn. 1998). If the trial court made no specific findings of fact, then we must look to the record to "determine where the preponderance of the

evidence lies." *Kendrick v. Shoemake*, 90 S.W.3d 566, 570 (Tenn. 2002). Review of questions of law is *de novo* with no presumption of correctness. *See State v. Levandowski*, 955 S.W.2d 603, 604 (Tenn. 1997).

V. Analysis

As a preliminary matter, Husband states in his brief on appeal that the technical record does not contain a notice of appeal and that this is a "jurisdictional issue." A notice of appeal was filed in the trial court on January 18, 2008, and a copy was received in the office of the clerk of this court on February 4, 2008. Consequently, we find that the appeal was timely filed and is properly before this court. *See* Rule 3(e), Tenn. R. App. P.

A. Modification of Child Support

Wife asserts that the trial court's reduction of Husband's child support obligation was error because its calculation of Husband's income was incorrect, its imputation of income to Wife was unsupported, and it failed to apply the Hardship Provision of the Income Shares Model.

This Court in *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244 (Tenn. Ct. App. 2000) addressed the standard of reviewing a trial court's decision regarding child support obligations:

> [W]e review child support decisions using the deferential "abuse of discretion" standard of review. This standard requires us to consider (1) whether the decision has a sufficient evidentiary foundation, (2) whether the court correctly identified and properly applied the appropriate legal principles, and (3) whether the decision is within the range of acceptable alternatives. See *BIF v. Service Constr. Co.*, No. 87-136-II, 1988 WL 72409, at *2 (Tenn. Ct. App. July 13, 1988) (No Tenn. R. App. P. 11 application filed). While we will set aside a discretionary decision if it rests on an inadequate evidentiary foundation or if it is contrary to the governing law, we will not substitute our judgment for that of the trial court merely because we might have chosen another alternative.

Id. at 248.

In January 2005, the Tennessee Department of Human Services' ("DHS") new Child Support Guidelines ("Guidelines") took effect. *Farmer v. Stark*, 2008 WL 836092, at *4 (Tenn. Ct. App. Mar. 27, 2008). The Guidelines are based on an Income Shares Model, which "presumes that both parents contribute to the financial support of the child in pro rata proportion to the actual income available to each parent." Tenn. Comp. R. & Regs. 1240-2-4-.03(1)(a). DHS' previous model, the Flat Percentage Model, differs from the Income Shares Model in that the Flat Percentage Model "calculated the amount of the child support award based upon the net income of the non-custodial or [ARP] and...assumed an equivalent amount of financial or in-kind support was being supplied to the child by the custodial or [PRP]." Tenn. Comp. R. & Regs. 1240-2-4-.03(1)(b).

"[U]nder the Income Shares model, both parents' actual income and actual additional expenses of rearing the child are considered and made part of the support order." Tenn. Comp. R. & Regs. 1240-2-4-.03(1)(b). After each parent's income is calculated, the trial court must then refer to "a numerical schedule, designated in these Guidelines as the Child Support Schedule (CS Schedule or Schedule)..., that establishes the dollar amount of child support obligations corresponding to various levels of parents' combined Adjusted Gross Income and the number of children for whom the child support order is being established or modified." Tenn. Comp. R. & Regs. 1240-2-4-.03(6)(a)(1). The dollar amount derived from the Schedule is a parent's Basic Child Support Obligation ("BCSO"). *Id*.

"[A]ll modifications [of child support orders] shall be calculated under the Income Shares Guidelines," Tenn. Comp. R. & Regs. 1240-2-4-.05(1), and "[u]nless a significant variance exists...a child support order is not eligible for modification." Tenn. Comp. R. & Regs. 1240-2-4-.05(2)(a); Tenn. Comp. R. & Regs. 1240-2-6-.03(1). A significant variance for orders that were "established or modified before January 18, 2005, under the flat percentage guidelines, and are being modified under the income shares provisions for the first time," is defined as:

> 1. At least a fifteen percent (15%) change in the gross income of the ARP; and/or
>
> 2. A change in the number of children for whom the ARP is legally responsible and actually supporting; and/or
>
> 3. A child supported by this order becoming disabled; and/or
>
> 4. The parties voluntarily entering into an agreed order to modify support in compliance with these Rules, and submitting completed worksheets with the agreed order; and
>
> 5. At least a fifteen percent (15%) change between the amount of the current support order and the proposed amount of the obligor parent's pro rata share of the BCSO if the current support is one hundred dollars ($100) or greater per month and at least fifteen dollars ($15) if the current support is less than one hundred dollars ($100) per month; or
>
> 6. At least a seven and one-half percent (7.5% or 0.075) change between the amount of the current support order and the amount of the obligor parent's pro rata share of the BCSO if the tribunal determines that the Adjusted Gross Income of the parent seeking modification qualifies that parent as a low-income provider.

Tenn. Comp. R. & Regs. 1240-2-4-.05(2)(b).

1. Calculation of Husband's Income

a. Husband's Sources of Income

Wife first asserts that the trial court erred in not considering, as part of Husband's income, (1) money transferred to him from his father, (2) income from his rental properties, and (3) personal expenses paid and taken as deductions by his medical business.

At trial, Husband testified that his father had loaned him money, that he executed promissory notes at an interest rate of 6% to evidence the loans, and that the loans totaled "a little over a quarter of a million dollars." He stated that, prior to trial, he started paying the loans back at about $1,500 per month.

During questioning of Husband about two other loans made to him by his father which were not evidenced by promissory notes, the trial court interjected as follows:

> THE COURT: Now, what were these amounts for?
>
> [Husband]: The boys went to Camp Ozark, it's over in Arkansas.
>
> THE COURT: Oh, and your dad paid for that?
>
> [Husband]: He just - - he offered to do that.
>
> THE COURT: Again, I'm not going to count that as income to this fellow if their grandfather wants to pay for them to go to camp.

Wife's attorney also questioned Husband regarding trips he took in an attempt to show that he was spending more than his monthly income and requested the "right to ask him questions about other discretionary expenses." In response to this line of questioning, the trial court stated that "even if he is [spending more than his monthly income], that's not what I'm going to base the modification on. I'm going to base it on what his income is."

Husband also testified that he and his current wife are the sole members of an LLC, which owns six condominium units that, in total, generate about $3,900 per month in rental payments. Wife's attorney asked about the income from those properties and Husband responded as follows:

> Q. Now, is it your intent that at some point [the LLC], will also become an income producing company?
>
> A. That would be nice. The way in which these were purchased, they're not returning any - - we've taken no distributions. And for the next several years, doubt if we'll have any distributable income from there.

Q. But they pay for themselves, don't they? They pay for their own mortgages?

A. Yes, we've had to put, I think, a couple thousand in last year, some more the year before that. We had to rehab a couple of the condos. So we've actually had to loan additional monies to that company.

Lastly, Wife's attorney questioned Husband regarding costs he claimed as business expense deductions on his tax forms. During the line of questioning, the trial court stated:

THE COURT: Okay. I'm done with the restaurants. I see what he's doing so - - which is fine for tax purposes, but I probably won't give him credit for child support purposes for deducting it from his income.

Upon review of the record, we do not find that the trial court erred in its calculation of Husband's income.[4] First, the trial court did not consider the loans evidenced by promissory notes to be gifts to Husband as he is required to pay back the money, plus interest, to his father. Second, the trial court considered the loans not evidenced by promissory notes to be gifts to the children and not attributable to Husband's income. Third, the trial court considered Husband's decision to spend money on vacations to be irrelevant to the calculation of his income and instead focused on the money that Husband earned. Fourth, the trial court did not impute any income to Husband from the properties owned by the LLC, which, according to Husband's testimony, were currently not producing any income. Lastly, the trial court held that, while appropriate for tax purposes, the business expenses deducted from Husband's tax forms would not be deducted for the purpose of calculating Husband's BCSO. A trial court's calculation of a party's income is a finding of fact and this Court accords the trial court's finding "a presumption of correctness, unless evidence preponderates otherwise." *Lindberg v. Lindberg*, 1995 WL 607557, at *2 (Tenn. Ct. App. Oct. 17, 1995); Tenn. R. App. P. 13(d). We find that the aforementioned evidence is sufficient to support the trial court's calculation of Husband's income.

b. Imputation of Income to Husband for Non-Income Producing Assets

Income may be imputed a parent in the following situations:

(I) If a parent has been determined by a tribunal to be willfully and/or voluntarily underemployed or unemployed; or

(II) When there is no reliable evidence of income; or

[4] The definition of income for the purpose of determining a party's BCSO is found under Tenn. Comp. R & Regs. 1240-2-4-.04(3)(a)(1), which includes, in part pertinent, "...all income from any source..., whether earned or unearned, and includes, but is not limited to, the following: (i) Wages; (ii) Salaries; ...(iv) Income from self-employment;...(xviii) Gifts that consist of cash or other liquid instruments, or which can be converted to cash." *Id*.

> (III) When the parent owns substantial non-income producing assets, the court may impute income based upon a reasonable rate of return upon the assets.

Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(a)(2)(i).

Wife asserts that trial court should have imputed income to Husband for his ownership in the non-income producing rental properties discussed above. The regulations state that a trial court "*may* impute income" for such assets. Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(a)(2)(i)(III) (emphasis added). "The word 'may' used in a statute ordinarily connotes discretion or permission and will not be treated as a word of command, unless there is something in the context of the subject matter of the statute under consideration to indicate that it was used in that sense." *Williams v. McMinn County*, 352 S.W.2d 430, 433 (Tenn. 1961); *see also Board of County Comr's of Shelby County v. Taylor*, 1994 WL 420922, at *4 (Tenn. Ct. App. Aug. 12, 1994) (holding "a provision couched in permissive terms is generally regarded as directory or discretionary" and "[t]his is true of the word 'may'"). We do not find anything in the regulation to suggest that the use of the word "may" is to be "treated as a word of command"; thus, the imputation of income for non-income producing assets is within a trial court's discretion. We do not find that the trial court abused its discretion in not imputing additional income to Husband for rental properties that were producing no income and have, in fact, forced Husband to incur additional expense.

c. Husband's Voluntary Underemployment

Wife asserts that Husband's decision to leave Associated Urologists for a lower paying job makes him voluntarily underemployed and that the trial court should impute additional income to him to compensate for his lowered income.

On direct examination, Husband was asked about his decision to leave his position at Associated Urologists and start his own business:

> Q. That's quite a change in going from being a urologist to being a pain management or a back pain physician. Why did you make that change?
>
> A. Two things, one, there was apparently a significant need for this service. Urology is fairly crowded. Economically, urology was very volatile and with a significant down side. If I was still in urology right now I'd probably be making, you know, 150 or less at this point. I spoke to one of my old partners recently and he said that the economic down pressure has continued in that practice. Whereas this at least has some prospect, some economic upside in that we're not in the insurance system right now.
>
> ***

> Q. Now, Dr. Johnson, I anticipate there being some criticism regarding your practice and the number of days that you work. And, again, tell the Court what you're doing to try to make this practice grow and how many days a week you're able to fill out totally.
>
> A. Right now we can generally fill out three days - - three full days a week. Sometimes we have slightly less than that. Occasionally, we'll have more than that...If people want to be seen, we are certainly available.
>
> And, currently, the most powerful marketing technique that I can possibly have...would be to write a good book on Prolotherapy...
>
> I'm meeting with a trainer..to do a seminar on this. So we're doing everything we can to try to get the word out to professional groups and chiropractors and other groups of people in town that would have the type of patients that we can help in their practices or in their world.

On cross examination, Wife's attorney asked Husband if he saw his "business as one that continues to have promise and develop," to which Husband responded in the affirmative. In calculating Husband's income, the trial court stated the following:

> The first issue that I determine is what is the income of Dr. Johnson. I have considered his past income for '06. His present income in '07, and projected income for the remainder of '07, and the deductions that he claimed, which I find were excessive, and come to an income of $260,000 for Dr. Johnson that I would use to base his child support on.

The trial court's Order reflected this finding.

In considering whether a parent is willfully and/or voluntarily underemployed or unemployed, the regulations include the following guidance, in part pertinent:

> The Guidelines do not presume that any parent is willfully and/or voluntarily under or unemployed. The purpose of the determination is to ascertain the reasons for the parent's occupational choices, and to assess the reasonableness of these choices in light of the parent's obligation to support his or her child(ren) and to determine whether such choices benefit the children.

Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(a)(2)(ii).

"Whether a party is willfully and voluntarily underemployed is a fact question, and the trial court has considerable discretion in its determination." *Willis v. Willis*, 62 S.W.3d 735, 738 (Tenn. Ct. App. 2001). "In making its determination, the trial court must consider the party's past and

present employment and whether the party's choice to accept a lower paying job was reasonable and made in good faith." *Id*. at 738; Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(a)(2)(ii)-(iii). "Although...a person has a right to pursue happiness and to make reasonable employment choices, an obligor parent will not be allowed to lessen his child support obligation as a result of choosing to work at a lower paying job." *Willis*, 62 S.W.3d at 738. Since this is a factual question, we accord the trial court's findings of underemployment "a presumption of correctness, unless the preponderance of the evidence is otherwise." *Id*. at 737-38; Tenn. R. App. P. 13(d).

We find that there is evidence in the record to support a finding that Husband was not voluntarily or willfully underemployed and that the finding supports the trial court's exercise of its discretion. The trial court heard Husband's explanation for leaving Associated Urology and starting his own practice. The trial court then weighed Husband's past, present and projected income before deciding whether the amount to be assigned to him for the purpose of calculating his BCSO revealed that he was underemployed. We do not find the evidence to preponderate against the trial court's finding that Husband was not underemployed.

2. Wife's Imputed Income

Wife asserts that the trial court erred in imputing to her an income of $30,000 a year for purposes of determining her BCSO when there was no evidence that she could earn that amount.

As stated above, Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(a)(2)(i) allows income to be imputed to a parent if they are voluntarily and/or willfully unemployed or underemployed. Under the new Guidelines and the Income Shares Model, the rule that a "parent will not be allowed to lessen his child support obligation as a result of choosing to work at a lower paying job" applies to both the PRP and the ARP. Once a trial court finds a party to be voluntarily or willfully underemployed, the next step is to determine the amount of the underemployment. In this regard, the regulations state that:

> [A]dditional income can be allocated to [a] parent to increase the parent's gross income to an amount which reflects the parent's income potential or earning capacity, and the increased amount shall be used for child support calculation purposes. The additional income allocated to the parent shall be determined using the following criteria:
>
> I. The parent's past and present employment; and
>
> II. The parent's education and training.

Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(a)(2)(ii)(II).

"Determining whether a parent is willfully and voluntarily underemployed and what a parent's potential income would be are questions of fact that require careful consideration of all the

attendant circumstances." *Richardson v. Spanos*, 189 S.W.3d 720, 726 (Tenn. Ct. App. 2005) (citing *Eldridge v. Eldridge*, 137 S.W.3d 1, 21 (Tenn. Ct. App. 2002)).

At trial, Wife testified that in 2004 she earned $22,584 in income, in 2005 she earned $27,324 in income and for the first half of 2006 she earned $14,000 in income. Wife also testified as to additional income she expected for work performed in the second half of 2006.

During cross-examination by her attorney regarding the start-up companies, the trial court interjected a question to Wife regarding her employment status:

> THE COURT: I have to ask you, why not just go get a regular job with a salary because this business is going nowhere....Why not go out there and get a regular job? You are certainly capable of it.
>
> [Wife]: I have done that...I don't have the luxury of working a $6.00 an hour a [sic] job. I have so much ground to makeup. I have debt out my ears...
>
> ***
>
> THE COURT: I'm not talking about any of that, I'm just talking about getting a job.
>
> [Wife]: ...I have made every effort that I can do to that...I need to make a $40,000 a year [sic] after taxes just to pay my legal bills and that does not cover my cost.
>
> THE COURT: ...it is nice to have a goal at $40,000.00, but you never even come close to that in any of these businesses. What if you went out and got a $30,000.00 job with benefits, that is better than what you have done so far.
>
> [Wife]: That would be - - I would, I would like to do that. I don't have, I would love, if I could get by on $30,000.00 a year that would be fabulous...
>
> THE COURT: You're talking about making a lot of money.
>
> [Wife]: I have to make a lot of money to gain all the ground I have lost...I don't have the luxury to work a $30,000.00 a year job. I'd love to do that. I have no problem. I worked 75 hours a week for nine years before I stopped to raise my four children all by myself.

In its Order setting child support obligations, the trial court stated that:

> [Wife] received $90,000 in rehabilitative alimony for a period of five (5) years, but had nothing to show that she used the alimony in any way to rehabilitate herself to go out into the work force, but instead she chose to start companies that either

> produced zero or negligible income. Further, the Court is of the opinion that [Wife] is extremely capable, can obtain full-time employment with salary and benefits and that she has an earning capacity of $30,000 per year.

In making its decision to impute additional income to Wife, the trial court never specifically found her to be underemployed. However, the trial court's use of the phrase "earning capacity" mirrors the language used in Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(a)(2)(ii)(II), which, as stated above, instructs a court to impute additional income to a voluntarily underemployed parent to reflect their "earning capacity." Furthermore, despite the trial court's omission of a specific finding of underemployment, both party's briefs treat the imputed income to Wife as income imputed due to voluntary underemployment. Thus, we infer that the trial court found Wife to be underemployed.

We find that sufficient evidence exists in the record to support the trial court's finding that Wife was underemployed. It is evident from Wife's testimony that she felt that she was capable of earning $30,000 a year, but was refusing to obtain such employment in the hope of securing a higher paying job. As a result, the trial court found that she was "extremely capable" of obtaining full-time employment that would pay her more money than she was earning. We accord the trial court's finding of underemployment "a presumption of correctness," *Willis*, 62 S.W.3d at 737-38; Tenn. R. App. P. 13(d), and the aforementioned evidence supports that presumption.

We also find there to be sufficient evidence to support the amount of income imputed to Wife by the trial court. Wife testified at trial regarding her income for 2004, 2005, and 2006, and also regarding her desired annual income. "Determining...what a parent's potential income would be [is a] question[] of fact," *Richardson*, 189 S.W.3d at 726, and this Court accords that determination a "presumption of correctness" on appeal. *Willis*, 62 S.W.3d at 737-38. We find the trial court's imputation of $30,000 to be supported by the evidence of Wife's past and present income of more than $20,000, her acknowledged ability to earn $30,000 a year and her desired annual income of $40,000.

3. Economic Hardship Provision

Wife asserts that the trial court erred in not finding that she qualified for the Hardship Provision of the Guidelines when determining her BCSO and in not applying an upward deviation as a result.

The Guidelines allow a trial court to "order as a deviation an amount of support different from the amount of the presumptive child support order if the deviation complies with the requirements of [this section]." Tenn. Comp. R. & Regs. 1240-2-4-.07(1)(b). "The amount or method of such deviation is within the discretion of the tribunal..." *Id*.

In her request for a deviation, Wife relies on Tenn. Comp. R. & Regs. 1240-2-4-.07(2)(h), titled "Hardship Provisions Due to Modification of Order," which states:

> 1. Any time following the effective date of these Rules when a tribunal is considering modification of an order initially established under Tennessee's Flat Percentage Guidelines, and the tribunal finds a significant variance between the amount of the existing child support order and the amount of the proposed child support order calculated under this chapter, *which change results from the application of the guidelines rather than from the change in the income and/or circumstances of the parties*, then the tribunal may modify the current child support order up to the full amount of the variance or may apply a hardship deviation as described below in parts 2-4.

Id. (emphasis added).

> The trial court's Order, in rendering its decision, stated that:
>
> [I]t is the opinion of the Court that a significant variance has occurred pursuant to the Child Support Guidelines in that one (1) child of the parties...graduated from high school in May, 2005, and turned eighteen (18) in March, 2006. It is further the opinion of the Court that as a result of such significant variance the amount of child support to be paid by Petitioner to Respondent should be modified, and that the Court should apply the present guidelines pursuant to the Income Shares Model.

The trial court further found that "if there is an economic hardship in this matter that [Wife] has elected voluntarily to bring it upon herself..."

The Guidelines repeatedly state[5] that the Hardship Provision is applicable only in situations where a child support order, initially established under the Flat Percentage guidelines, is modified under the Income Shares guidelines and any change in the amount of child support to be paid is caused by "the application of the guidelines rather than from the change in the income and/or circumstances of the parties." Tenn. Comp. R. & Regs. 1240-2-4-.07(2)(h)(1). The trial court found that the modification of Husband's BCSO was caused by a change in the circumstance of the parties - one child turning eighteen - and not as a result of the application of the Income Shares Model of the Guidelines. Thus, the trial court did not err in not granting a deviation in the amount of the child support obligation imposed on each party.

B. Private School Tuition

1. Partial Tuition for the Older Child

Wife asserts that Husband should have been ordered to pay the full amount of the private school tuition for the older child because of the increase in Husband's annual income and Wife's economic hardship.

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[5] *See* Tenn. Comp. R. & Regs. 1240-2-4-.07(2)(h)(2), .07(2)(h)(2)(ii) and .07(2)(h)(3).

The Guidelines allow for the imposition of extraordinary expenses, in addition to the child support amounts listed in the Schedule, which include, among other things, educational expenses:

> Extraordinary educational expenses may be added to the presumptive child support as a deviation. Extraordinary educational expenses include, but are not limited to, tuition, room and board, lab fees, books, fees, and other reasonable and necessary expenses associated with special needs education or private elementary and/or secondary schooling that are appropriate to the parents' financial abilities and to the lifestyle of the child if the parents and child were living together.

Tenn. Comp. R. & Regs. 1240-2-4-.07(2)(d)(1)(i).

"[T]he guidelines contemplate private school tuition to be an 'extraordinary educational expense' because the tuition exceeds or departs from the cost of public schooling." *Barnett v. Barnett*, 27 S.W.3d 904, 907 (Tenn. 2000). "[P]ayment of extraordinary educational expenses is a separate component of an obligor's [BCSO]" and a trial court "can order the obligor to pay less than the full amount of a child's (or children's) extraordinary educational expenses, depending upon the proof in a particular case." *Kaplan v. Bugalla*, 188 S.W.3d 632, 636 (Tenn. 2006); *Richardson v. Spanos*, 189 S.W.3d 720, 728-29 (Tenn. Ct. App. 2005) (holding that "this court has consistently approved arrangements requiring the non-custodial parent to pay only a portion of the private school expenses even when the non-custodial parent's income far exceeds that of the primary residential parent").

The child support provisions under the old guidelines stated that "'[e]xtraordinary educational expenses...*shall* be added to the percentage calculated in the above rule [setting out the percentage of net income to be paid as child support].'" *Kaplan*, 188 S.W.3d at 635 (citing *Barnett*, 27 S.W.3d at 907). However, "[i]n 2005 the child support guidelines were revised to provide that additional support for extraordinary educational expenses should be calculated separately and 'may' be added to the basic support award." *Id.* at 638 n.9. As stated earlier, the use of the word "may" connotes discretion on the part of the trial court, unless the context of the statute indicates otherwise. *Williams*, 352 S.W.2d at 433. The change in wording under the Guidelines from "shall" to "may" is a clear indication that the imposition of the extraordinary expense of private school tuition is now a discretionary decision.

In ruling on the issue of private school tuition, the trial court held:

> It is the opinion of the Court that based on [Husband's] income at the present time and the reduction in the child support payment to [Wife], that [Husband] can pay more toward the private school tuition. The Court is of the opinion that [Husband] has the present ability to pay the amount of $1,250.00 per month toward private school..."

The trial court found that Husband was able to pay more towards the private school tuition and exercised its discretion in ordering him to do so. As was held in *Kaplan*, a trial court is not required to order an ARP to pay the full amount of the tuition. *Kaplan*, 188 S.W.3d at 636; *Richardson*, 189 S.W.3d at 728-29. As such, we do not find that the trial court abused its discretion in its allocation of the private school tuition between the parties.

2. Private School Tuition for the Youngest Child

Wife asserts that the trial court erred in not requiring Husband to pay for any of the private school tuition of the youngest child.

This Court in *Richardson*, *supra*, addressed a parent's authority to make educational decisions for the children:

> *Barnett v. Barnett* [*supra*.] stands for the proposition that the primary residential parent, having the authority to make educational decisions on behalf of the child, has the authority to enroll a child in private school without the other parent's consent and thereby incur the expenses of private school tuition that both parents may be obligated to pay.

Richardson, 189 S.W.3d at 727.

At trial, Wife testified that, currently, the older child was attending private school at Ensworth School and that the youngest child was in public school at Hume-Fogg High School. She stated that the youngest child was doing fine, academically, and was participating in extracurricular activities.

In regard to private school tuition, the trial court's Order stated:

> As relates to the private school tuition for [the older child] at the Ensworth School, it is the opinion of the Court that [the child] has been in Ensworth for three (3) years and that it is not in the best interest to force [the child] out of his present environment.
>
> ***
>
> Also, it is the opinion of the Court that [the youngest child] should remain at his present school, Hume-Fogg Academic High School in Nashville.

Wife, as the PRP, had the authority to enroll the youngest child in private school, *Richardson*, *supra*, but elected not do so. Trial courts have discretion in deciding whether to impose the extraordinary expense of private school tuition on a party. Tenn. Comp. R. & Regs. 1240-2-4-.07(2)(d)(1)(i); *Williams*, 352 S.W.2d at 433. We do not find that the trial court abused its discretion

in not requiring Husband to pay for the private school tuition of a child who was not enrolled in a private school at the time of trial.

C. Motion to Rehear

Wife argues that the trial court erred in denying her Motion to Rehear without holding a hearing.

On January 31, 2007, Husband filed a Motion to Strike Wife's Pleadings, alleging, among other things, that Wife failed to comply with Rule 26, Tenn. R. Civ. P.,[6] and that testimony from her expert should not be allowed. In an order dated February 22, 2007, the trial court ruled on the motion and held, in part, that "[t]he expert testimony to be offered by [Wife] will be limited to whether the expenses of Prolotherapy are reasonable and ordinary business expenses. The expert will not be permitted to opine on any other subject." Wife filed a Motion to Rehear on March 23, 2007, asking the court vacate this decision and to reverse its limitation on the subjects about which her expert could testify.

On September 4, 2007, the trial court entered an order on Wife's Motion to Rehear, stating:

> The Court will deem this Motion as a Motion to Alter or Amend under Rule 59 of the Tennessee Rules of Civil Procedure. After a careful review of the Motion and the response to the Motion, the Court finds the Respondent's Motion to be without merit.

"The Tennessee Rules of Civil Procedure, adopted in 1970, provide for certain enumerated post-trial motions, but do not include petitions or motions for rehearing." *State ex rel. Turner v. Bryant*, 2008 WL 2388630, at *4 (Tenn. Ct. App. June 12, 2008) (citing *Mash v. Mash*, 1989 WL 22704, at *2 (Tenn. Ct. App. Mar. 15, 1989)). "Because courts generally construe motions in accordance with their substance, rather than their title or form, a motion to rehear is considered to be in essence a Rule 59 motion to alter or amend the judgment." *Id*. (citing *Bemis Co. v. Hines*, 585 S.W.2d 574, 576 (Tenn. 1979)).

Local Rule 6.02 of the Twenty-First Judicial District[7] states that "[m]otions for new trial, motion for judgment n.o.v. and motions to alter or amend will not be set for hearing exception [sic] upon direction of the judge."

The trial court properly considered Wife's Motion to Rehear as a Motion to Alter or Amend and its disposition of the motion without a hearing was in accordance with the local rules of the judicial district.

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[6] Rule 26, Tenn. R. Civ. P., governs the discovery process. Husband argued that Wife's experts violated this rule by failing to comply with Husband's discovery requests applicable to experts.

[7] Williamson County is in the Twenty-First Judicial District of Tennessee.

D. Discovery Issues

On June 30, 2006, Wife served a Request for Production of Documents on Husband, seeking, among other items, the tax returns filed by Associated Urologists for 2003, 2004, and 2005; a general ledger from Associated Urologists for 2003, 2004, and 2005; and a general ledger for Prolotherapy for 2005 and 2006. On August 1, 2006, Wife filed a Motion to Compel, asserting that Husband had not answered her interrogatories or her request for these documents.

On September 8, 2006, Wife filed a Motion to Continue the hearing set for September 19, 2006. The trial court granted that motion and continued the hearing indefinitely.

On November 7, 2006, Husband filed a Motion to Set, which was heard on December 5, 2006. The trial court set the deadline for written discovery on December 29, 2006, and set the matter for a hearing on February 6, 2007.

On January 30, 2007, Wife filed a Motion to Continue the February 6, 2007, hearing on the ground that Husband failed to produce the documents listed in the June 30 Request for Production of Documents. The trial court entered an order granting the motion on February 22, 2007.

On August 10, 2007, Husband filed another Motion to Set the matter for a hearing date. On September 4, 2007, Wife filed a Response to Motion to Set, arguing, among other things, that discovery was not complete as she had not received the records listed in her June 30, 2006, Request for Production of Documents. On September 4, 2007, the trial court continued Husband's Motion to Set for the purpose of allowing Wife to obtain new counsel.

On October 3, 2007, the trial court addressed Husband's Motion to Set and entered an order setting the matter for a hearing on October 30, 2007. On October 29, 2007, Wife filed a Motion to Continue, asserting that Husband had not provided the general ledger of Prolotherapy and that further depositions of Husband would be needed. The motion was heard on October 30, 2007, and the trial court entered an order on November 9, 2007, granting a short continuance to allow Wife's new attorney to prepare for trial,[8] but ending discovery.

1. Motion to Compel

Wife asserts that the trial court erred in failing to address her August 1, 2006, Motion to Compel Production of Documents.

Upon review of the record, we cannot find an order of the trial court disposing of Wife's Motion to Compel. However, in her September 8, 2006, Motion to Continue, Wife addresses the Motion to Compel by stating, in part, that:

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[8] Wife's new attorney was retained on October 29, 2007.

> 1. [Wife's] counsel propounded discovery on [Husband], by and through his attorney, June 30, 2006.
>
> [Husband] failed to respond to [Wife's] discovery within the prescribed time and [Wife's] counsel filed a Motion to Compel [Husband's] responses. [Wife's] Motion to Compel was heard on August 8, 2006, whereupon the parties entered into an Agreed Order that [Husband] would provide his discovery responses on or before August 22, 2006.

Wife further asserts in her Motion to Continue that Husband allegedly failed to produce the requested documents by the date in the Agreed Order; however, no other Motion to Compel was ever filed.

Based upon Wife's September 8, 2006, Motion to Continue, we find that her Motion to Compel was addressed by the trial court at August 8, 2006, hearing, and that it was disposed of by Agreed Order of the parties. As such, we do not find there to be a pending Motion to Compel.

2. Discovery Requests

Wife asserts that the trial court erred in ending discovery when she had an outstanding discovery request that Husband had allegedly not fully answered.

"Decisions with regard to discovery matters are in the sound discretion of the trial court, and so appellate courts are reluctant to reverse a trial court's decision unless a clear abuse of discretion is demonstrated." *Price v. Mercury Supply Co., Inc.*, 682 S.W.2d 924, 935 (Tenn. Ct. App. 1984) (citing *Payne v. Ramsey*, 591 S.W.2d 434, 436 (Tenn. 1979)).

Husband filed a Response to Wife's January 20, 2007, Motion to Continue, stating that he did not have "possession, custody, or control" of Associated Urologists' tax returns; that he was not aware as to whether Associated Urologists kept a general ledger; and that he had provided all bank statements for Prolotherapy, which reflected all "cash going in to the business account and cash going out."

Husband also filed a Response to Wife's October 29, 2007, Motion to Continue, contending that all documentation of Prolotherapy was produced and that Wife's motions to continue were attempts to delay the hearing. Husband attached all the bank statements of Prolotherapy he previously produced as an exhibit to his Response.

Wife's initial request for the documents at issue was made in June 2006; Husband acknowledged that he produced the documents he had and responded further that he either did not possess the remaining documents or that he was unaware as to whether those documents existed. Despite his response, Wife continued to request these documents and to rely on Husband's alleged failure to produce them in support of her requests to continue the matter. The last request for a continuance based on the alleged incomplete discovery came over a year after the initial Request for

Production of Documents was served upon Husband. As stated earlier, Wife did not file an additional motion to compel after Husband allegedly failed to produce documents by the August 22, 2006, deadline set in the Agreed Order or by the December 29, 2006, deadline set by the trial court at the December 5, 2006, hearing. A trial court's discovery decision will only be reversed based on evidence of a clear abuse of discretion. *Price v. Mercury Supply Co., Inc.*, 682 S.W.2d at 935. We do not find that the trial court abused its discretion in ending discovery based on Husband's representations to the trial court and Wife's failure to file an updated Motion to Compel over the extended period of time that discovery was open.

D. Legal Expenses

Wife asserts that the State of Tennessee should be required to cover her legal expenses for its failure to provide sufficient services to defend this action.

Wife previously filed a motion requesting that this Court order the Attorney General to enter an appearance on her behalf or to compensate her for legal fees. This Court entered an order in response to that motion on August 18, 2008, holding that Wife's "motion does not indicate that [she] ever applied for child support services from the state, and we know of no authority which would permit us, upon motion, to order the Attorney General to take the requested action." As such, the issue has already been addressed and we find no reason to reconsider our decision.

VI. Conclusion

For the reasons set forth above, the decision of the Circuit Court is AFFIRMED. Costs are assessed against Wife, for which execution may issue if necessary.

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RICHARD H. DINKINS, JUDGE